



BILLING CODE: 7565-01

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 542

RIN 3141-AA55

Minimum Internal Control Standards

AGENCY: National Indian Gaming Commission.

ACTION: Notification of final rulemaking; stay.

SUMMARY: The National Indian Gaming Commission (NIGC) is suspending its minimum internal control standards (MICS) for Class III gaming under the Indian Gaming Regulatory Act. Updated guidance for Class III MICS will now be maintained at www.nigc.gov.

DATES: This rule is effective [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Title 25 CFR part 542 is stayed effective [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jennifer Lawson at 202-632-7003 or write to info@nigc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The NIGC Class III MICS were promulgated in 1999 and last substantively revised in 2005. In 2006, the D.C. Circuit Court of Appeals in *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134 (*CRIT v. NIGC*), held that NIGC lacked authority to enforce or promulgate Class III MICS. Since that time, the Class III MICS have remained untouched. Technology has advanced rapidly, though, making some standards obsolete and introducing new areas of risk not contemplated by the outdated standards. And yet, many tribal-state compacts—even those entered into since 2006—continue to adopt NIGC Class III MICS by reference.

II. Development of the Rule

In light of the ruling in *CRIT v. NIGC* and recognizing the industry's need for updated standards, the NIGC sought comment on what to do with the outdated standards still remaining in the regulations and whether to draft updated, non-binding guidance for Class III MICS. Between 2015 and 2016, over forty tribes provided comment and overwhelmingly supported the NIGC proposal for non-binding guidance. Many also supported keeping the existing 542 regulations in the Code of Federal Regulations, even though they would be unenforceable, to minimize impacts on tribal/state compacts that incorporate them by reference. Additionally, the Commission sent letters to state gaming regulators on June 14, 2017, requesting comment on the draft guidance. One responded with recommendations.

In light of these comments, the Commission has developed non-binding guidance for Class III MICS and is suspending the existing part 542 regulations. Doing so will leave the existing regulations “on the books,” but with an editorial note stating that they are not enforceable. The updated guidance document for Class III MICS is available on the NIGC website at www.nigc.gov. This guidance is not intended to modify or amend any terms in a state compact.

Because the document will be guidance instead of regulations, NIGC will be able to keep it updated and adapt much more quickly to changes in the industry.

III. Regulatory Matters

Notice and Comment

Typically, the suspension of Agency regulations would require the Agency to follow the notice and comment process mandated by the Administrative Procedure Act (APA). However, the APA permits agencies to finalize some rules without first publishing a proposed rule in the Federal Register. This exception is limited to cases where the agency has “good cause” to find that the notice-and-comment process would be “impracticable, unnecessary, or contrary to the public interest.” In this case, because the D.C. Circuit has ruled that the NIGC may not enforce its Class III MICS, or even maintain them as agency regulations, the NIGC has good cause to find that the notice and comment period is unnecessary and may directly publish a final rule suspending the Class III MICS regulations. The NIGC did not appeal the Circuit court’s decision to the United

States Supreme Court, so it is the law of the land and the NIGC has no discretion in regard to following the court's mandates.

Regulatory Flexibility Act

The rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of \$100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions, nor will the proposed rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises, to compete with foreign based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

Paperwork Reduction Act

Suspending part 542 also suspends any information collection requirements contained within. Therefore, no detailed statement is required pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

Tribal Consultation

The National Indian Gaming Commission is committed to fulfilling its tribal consultation obligations—whether directed by statute or administrative action such as Executive Order (E.O.) 13175 (Consultation and Coordination with Indian Tribal Governments)—by adhering to the consultation framework described in its Consultation Policy published July 15, 2013. The NIGC’s consultation policy specifies that it will consult with tribes on Commission Action with Tribal Implications, which is defined as: Any Commission regulation, rulemaking, policy, guidance, legislative proposal, or operational activity that may have a substantial direct effect on an Indian tribe on matters including, but not limited to the ability of an Indian tribe to regulate its Indian gaming; an

Indian tribe's formal relationship with the Commission; or the consideration of the Commission's trust responsibilities to Indian tribes.

On February 26, 2015, the Commission announced consultation and sought comments over its plans to draft updated, non-mandatory Class III MICS guidance and proposal to withdraw the part 542 regulations. The Commission held four in-person and one telephonic consultation sessions. The consultation and comment period ended on February 23, 2016. Over forty tribes commented on the plan. As a result of the comments, the Commission, on November 22, 2016, announced its proposal to suspend the part 542 regulations and issue updated, non-mandatory Class III MICS guidance. The Commission developed and shared a draft of the guidance and held six in-person consultation sessions. The Commission received comments through July 2017.

List of Subjects in 25 CFR Part 542

Accounting, Administrative practice and procedure, Gambling, Indian—Indian lands, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, the Commission amends 25 CFR part 542 as follows:

PART 542—MINIMUM INTERNAL CONTROL STANDARDS

1. The authority for part 542 is revised to read as follows:

Authority: 25 U.S.C. 2706(b)(10).

2. Section 542.1 is revised to read as follows:

§542.1 What does this part cover?

(a) This part previously established the minimum internal control standards for gaming operations on Indian land.

(b) This part is suspended pursuant to the decision in *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134 (D.C. Cir. 2006). Updated non-binding guidance on Class III Minimum Internal Control Standards may be found at www.nigc.gov.

3. Effective [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], part 542 is stayed.

Jonodev O. Chaudhuri,
Chairman.

Dated: July 18, 2018.

Kathryn Isom-Clause,
Vice Chair.

Dated: July 18, 2018.

[FR Doc. 2018-16254 Filed: 8/10/2018 8:45 am; Publication Date: 8/13/2018]